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No. 81-523

IN THE

Supreme Court of the United States

October Term, 1982

CONTAINER CORPORATION OF AMERICA,
Appellant,

against

FRANCHISE TAX BOARD,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

Brief on Behalf of the State of New York as Amicus Curiae

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Dated: September 21, 1982

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Question Presented.

While several questions are presented in appellant's brief, this brief is limited to the question of whether the Due Process and Foreign Commerce Clauses of the United States Constitution prevent States from imposing properly apportioned franchise taxes measured by income on corporations with worldwide income derived from a unitary business.

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Interest of *Amicus Curiae*

Container Corporation of America ("Container") challenges long-standing interpretations of law upholding the constitutionality of certain statutes under which New York State and other States are collecting franchise taxes.

These statutes apportion to a state part of the worldwide income of a corporation attributable to that state based upon the unitary business principle.* A decision adverse to the California Franchise Tax could require New York and

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*Under its Franchise Tax on Business Corporations, pursuant to section 211, subdivision 4-a of the Tax Law, New York State requires certain oil companies which are engaged in a unitary business to report their income in the manner just described. Subdivision 4-a provides as follows:

> "4-a. In the case of a taxpayer subject to tax under this article and which also comes within the definition of oil company, as such term is defined in subdivision two of section one hundred eighty-two-a of this chapter, which owns or controls, either directly or indirectly, more than fifty percent of the capital stock of one or more other corporations, or more than fifty percent of the capital stock of such taxpayer is owned or controlled, either directly or indirectly, by one or more other corporations or more than fifty percent of the capital stock of such taxpayer and one or more other corporations are owned or controlled, either directly or indirectly, by the same interests, the tax commission shall require the filing of a report showing the entire net income and capital of each of those corporations, whether or not such corporations are taxpayers, and such other information as it deems necessary. If, in order to reasonably attribute to this state a fair and proper portion of the income and capital of such taxpayer, or either of such items: (a) income or capital, or one or more or any portion of such items, of one or more of such corporations, must be treated as the income and capital of such taxpayer; or (b) the income, capital or deductions, or one or more or any portion of such items, must be apportioned or allocated between or among such taxpayer and such other corporations then the tax due by such taxpayer under this article shall be computed."

Under its Franchise Tax on Business Corporations, pursuant to section 211, subdivision 4 of the Tax Law, New York can require or permit corporations not required to report under subdivision 4-a of section 211 of the Tax Law to report income and capital on a combined basis where the corporations are part of a unitary business conducted by the entire group of corporations and certain other conditions are met. See Business Corporation Franchise Tax Regulations, 20 NYCRR 6-2.1 through 6-2.7.

other States to change their existing fair methods for reporting franchise taxes in the case of multinational corporations. If this Court's decision were to mandate such a change, the administration of corporate taxes by the States would be more difficult and less practical and income properly attributable to the various states of the United States would escape taxation.

ARGUMENT

POINT I

Unitary based tax reporting does not violate the due process clause of the United States Constitution.

It is settled beyond question that "the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co. v. Minnesota,* 358 US 450, 460 (1959); *General Motors Corp. v. Washington,* 377 US 436 (1964); *Mobil Oil Corp. v. Commissioner of Taxes,* 445 US 425, 436-442 (1980). See also, *Underwood Typewriter Co. v. Chamberlain,* 254 US 113 (1920); *Hans Rees' Sons v. North Carolina,* 283 US 123 (1931); *Butlers Brothers v. McColgan,* 315 US 501 (1942); *Moorman Manufacturing Co. v. Bair,* 437 US 267 (1978). In determining what constitutes "fairly apportioned", this Court has enunciated the following standard:

> "That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system." *Illinois Central Railroad Co. v. State of Minnesota,* 309 US 157, 161 (1940), reh den, 309 US 695 (1940).

In *Mobil Oil Corp., supra,* 445 US at 439, this Court observed that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle" (footnote omitted). In accordance with this principle, the Court has upheld state apportionment formulas, such as that of California, which combine the income of several related corporations engaged in a "unitary" business. Income is generally allocated to the taxing State by multiplying the total net income of the enterprise by a percentage comprised of the average of the ratios of in-state property, payroll, and sales to total property, payroll and sales. See, *United States Steel Corp. v. Multistate Tax Commission,* 434 US 452, 475 n 25 (1978); *Exxon Corp. v. Wisconsin Department of Revenue,* 447 US 207, 214 n 3 (1980); *Mobil Oil Corp., supra,* 445 US at 429-430 nn 2-4. A unitary business is one in which all of the corporate constituents are involved in an economically functionally-related enterprise. As one leading commentator has observed, the "very essence of formulary apportionment [is] that where there are integrated, interdependent steps in the economic process carried on by a business enterprise, there is no logical or viable method for accurately separating out the profit attributable to one step in the economic process from other steps." J. Hellerstein, *State and Local Taxation,* 400 (3d ed, 1969). See also, *Butler Brothers, supra,* 315 US at 508; *Hans Rees' Sons, supra,* 283 US at 133.

Logically, it is impossible, when a tax is fairly apportioned, to have the same income taxed twice by the several States. See, *Northwestern States Portland Cement Co. v. Minnesota,* 358 US 450 *(supra).* Allocation formulas may not, however, always reflect income of corporations solely within a State. This fact has not been considered to be a sufficient basis for holding that they deprive corporations of Due Process or infringe upon the Commerce Clause. *International Harvester v. Evatt,* 329 US 416 (1947). In cases where application of the formula results in income

allocable to a State being improperly reflected, this Court and the States have provided for the adjustment allocation formulas. This is shown, for example, by New York Tax Law, § 211, subd 5.*

We may note that it has been New York State's recent experience that tax reporting on a unitary basis has not consistently resulted in more State corporate taxes being exacted than would be the case if the corporations were treated as separate and independent.

In the instant case, the Court of Appeal of the State of California found that Container Corporation of America did not meet its burden of showing by clear and cogent

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*New York Tax Law, § 211, subd 5 provides:

> "5. In case it shall appear to the tax commission that any agreement, understanding or arrangement exists between the taxpayer and any other corporation or any person or firm, whereby the activity, business, income or capital of the taxpayer within the state is improperly or inaccurately reflected, the tax commission is authorized and empowered, in its discretion and in such manner as it may determine, to adjust items of income, deductions and capital, and to eliminate assets in computing any allocation percentage provided only that any income directly traceable thereto be also excluded from entire net income, so as equitably to determine the tax. Where (a) any taxpayer conducts its activity or business under any agreement, arrangement or understanding in such manner as either directly or indirectly to benefit its members or stockholders, or any of them, or any person or persons directly or indirectly interested in such activity or business, by entering into any transaction at more or less than a fair price which, but for such agreement, arrangement or understanding, might have been paid or received therefor, or (b) any taxpayer, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, enters into any transaction with such other corporation on such terms as to create an improper loss or net income, the tax commission may include in the entire net income of the taxpayer the fair profits which, but for such agreement, arrangement or understanding, the taxpayer might have derived from such transaction."

evidence that extraterritorial values were being taxed. If those conditions are adequately based on the record, the principles announced by the Court fully support the interpretation of California's tax.

Container argues that the method under which a part of its worldwide income is apportioned to California is a method which cannot be applied to Container because the differing wage and profit rates of the foreign countries in which it does business render the formula so inexact as to constitute extraterritorial taxation in violation of the Due Process Clause. In the instant case, the California court found that Container and its foreign subsidiaries were a unitary enterprise and, thus, apportionment of worldwide income could be used as the method for measuring the income subject to California's franchise tax. Assuming that the facts of this case support the finding of a unitary enterprise, an examination of the facts revealed by Container's brief shows that the apportionment of its worldwide income produces an attribution of income which is well within the standards required by the Due Process Clause.

Container's attack on the apportionment of its worldwide income centers on its contention that the wage rates which its foreign subsidiaries must pay are considerably lower than the wages it must pay in the United States. One of its larger subsidiaries operated in Germany during the relevant years where the amount of wages required to produce a dollar of net income exceeded the amount required to be paid in the United States (Applt Br, pp 17, 18). Container admits that the wage rates in "the more advanced industrial countries are, in recent years, approaching, and in some cases exceeding, those in the United States * * *" (Applt Br, p 12). Moreover, Container's statistics regarding the alleged expected higher rate

of return from investment in the less industrialized countries, which presumably are attributable to lower wages, do not take into account the risks caused by political and social conditions in these countries which can result in large and catastrophic losses in later years.

In any event, the wage factor is only one of three factors used to apportion the combined income of Container and its subsidiaries. California Revenue and Taxation Code, §§ 2528, *et seq.* The other factors of sale and property must also be considered. The chart found on page 18 of Container's brief alleges the dollar amount of sales, payroll and property required to produce $1.00 of net income for Container's domestic and foreign subsidiaries. Of the five foreign countries listed, the United States required sales of $10.65; Mexico—$10.69; and in Germany—$17.62 to produce a dollar of profit. The average sales required to produce a dollar of profit in the five foreign countries listed on the chart is $9.24 or 86.76 percent of the $10.65 required in the United States.

A similar analysis of the property factor shows that the average amount of property required to produce a dollar of profit in the five foreign countries listed is $5.15, a higher amount than required in the United States.

The total combined net income of Container and its subsidiaries is listed at $41,710,000. Calculated by the worldwide apportionment method, a pre-tax yearly average of $32,068,000 was attributed to the United States; whereas, $28,121,000 was attributable to this country if it were allocated by the separate accounting method (Applt Br, p 17). Thus, the difference between the two methods equals $3,947,000 ($32,068,000 – $28,121,000), or 9.46 percent of the total combined income ($3,947,000 ÷ $41,710,000). This 9.46 percent must be divided among all 50 States, or at least those States in which Container

does business. Thus, when all the factors are considered in this case, even using Container's figures as we have done, the difference resulting from the use of the two different allocation formulas, neither of which is perfect, is relatively small. The amount of sales required to produce a dollar of net income is substantially the same as in this country and the value of property required to produce a dollar of net income is, based on Container's own figures, actually higher. This would indicate that the method used by California, under which worldwide income is apportioned is, in fact, a reasonable and fair system of attributing income to California or other States using that method. Moreover, as our discussion suggests, there is no basis for assuming that the method used here has any inherent basis in favor of reaching extraterritorial profits.

This Court said in *International Harvester Co. v. Evatt*, 329 US 416, 422 (1947):

> "Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive complex business activities such as those of appellant, and has declared that 'rough approximation rather than precision' is sufficient."

Throughout the due process portion of its brief, Container has relied most heavily on *Norfolk and Western Railroad Co. v. Missouri State Tax Commission*, 390 US 317 (1968). An examination of the *Norfolk and Western* case shows that it is inapplicable to this case because it dealt with the taxation of property and not income. *Norfolk and Western*, invovled the validity of Missouri's mileage based apportionment formula used in connection with an *ad valorem* tax on railroad rolling stock. Thus, the question was whether the property being taxed was located in the State since "taxation of property not located in the taxing State is constitutionally invalid * * *." *Id.*, at 325.

Up to now, we have defended the apportionment of worldwide income as a method which is within the tolerances allowed by the Due Process Clause of the United States Constitution. Based upon principles long recognized by this Court, however, this method has much to commend it as a fair and realistic method of attributing income to a State. Indeed, this conceptual soundness not only serves to bring worldwide apportionment even further within allowable constitutional tolerances, but also it once more shows that the statistical and separate accounting approaches taken by Container are a highly dubious means of accurately attributing income. Moreover, this Court has made it clear that the States are not limited to a single formula in assessing taxing of the type involved here.

In *Underwood Typewriter Co. v. Chamberlain,* 254 US 113, 117 (1920), this Court was called upon to decide the validity of the application of Connecticut's single-factor property apportionment formula to Underwood's operations. Even though only 3 percent of its profts were due to sales in Connecticut, Underwood's manufacturing and storage facilities were located in that State. *Id.*, at 119, 120. Thus, using the single-factor property formula, 47 percent of its profits were apportioned to Connecticut. *Id.*, at 120. In sustaining the apportionment formula against a due process attack, the Court stated:

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut, and ending with sale in other states. The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the process conducted with its borders. It therefore adopted a method of apportionment which, for all that ap-

> pears in this record reached, and was meant to reach, only the profits earned within the state." *Id.* at 120-21.

(The *Underwood* case was cited with approval and was deemed controlling in *Moorman Manufacturing Co. v. Bair,* 437 US 267, 273-74 [1978].)

In attempting to attribute to California the combined income of Container and its foreign subsidiaries, all of which corporations are linked by way of the conduct of a unitary business, California's legislature had a choice to make between the separate accounting and worldwide apportionment methods. It chose the method under which worldwide income is apportioned because that method takes into account numerous organizational and functional factors which have a bearing on "the process conducted within its borders" (*Underwood Typewriter Co., supra,* at 121) and because the method is admirably suited to the "expansive, complex business activities such as those of appellant" (*International Harvester Co., supra,* at 422). The lower court recognized these facts when it stated:

> "The evidence appellant [Container] presented with respect to the disproportionality of income allocation is not compelling. It fails to account for contributions to income which result from the functional integration and centralization of management which exist in a unitary operation. It is 'misleading to characterize the income of the business as having a single identifiable "source". Although separate geographic accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required'." *Container Corp. of America v. Franchise Tax Board,* 117 Cal App 3d 988, 1004 (Cal Ct App, 1981).

When Container relates the figures it computes on a geographic basis for wages, sales and property to the "income" which it asserts to be correct on a geographic basis, it does so using the "income" it computes for its own bookkeeping purposes or for Federal tax purposes and not the income of the unitary business. By ignoring the income of the unitary business, Container ignores the fact that factors of payroll, sales and property located in one geographic area may produce net income recorded on the books in another geographic area. With a unitary business, there is no way that the profits attributable to interrelated activities can be separated. *Mobil Oil Corp. v. Commissioner of Taxes,* 445 US 425, 438 (1980). Thus, Container's figures do not support a conclusion based on constitutional principles that the apportionment of worldwide income attributes more taxable income to California than does Container's own bookkeeping methods.

The separate accounting and arm's-length methods which Container claims are the only constitutionally permitted methods for multinational corporations have been subjected to substantial adverse criticism. This criticism has come from legal scholars (89 Harv L Rev 1202, Geoffry John Harley, "International Division of the Income Tax Base of Multination Enterprise"), The Treasury itself (The President's 1978 Tax Program, January 30, 1978, pp 282-297), and the General Accounting Office ("IRS Could Better Protect U.S. Tax Interests in Determining the Income of Multinational Corporations," September 30, 1981) among others.

The approach is, moreover, theoretically wrong because the separate entity approach does not conform to economic reality. Commonly controlled corporations are aware that additional benefits to the business as a whole may be derived from dealing with one another; therefore,

they do so. Economies of scale and reduced transaction costs may result where commonly controlled companies contribute either horizontally or vertically to a single production-distribution process. Centralized management control may produce efficiencies in management in raising capital, in obtaining quantity discounts and in advertising. Diversification of risk creates potential savings even where there are few similarities between affiliates. Policital and economic power, which may be used to increase long-run profits of the whole multinational corporation, may stem from large size alone regardless of the degree of compatibility between the affiliates.

As an aid in administering the system, section 482 of the Internal Revenue Code provides the Federal Internal Revenue Service with policing power. It provides:

> "In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or business."

The Department of Treasury has adopted implementing regulations (Reg, §1.482, *et seq.*). These regulations attempt to compare intercorporate transactions to those conducted by separate entities. It views each corporation as separate and independent and uninfluenced by the existence or opportunities to deal with related entities. As

pointed out in the President's 1978 Tax Program, *supra,* pp. 286-287, the regulations are only a partial solution even for Federal taxation:

> "The arm's-length standard is a necessary and valuable tax measure, but it is sometimes difficult to administer: multinational firms often invest abroad because no well-established market exists for the goods and services which are transferred in inter-affiliate transactions * * *. Although many multinational companies follow perfectly acceptable transfer pricing practices, the experience of the Internal Revenue Service has been that some do not, and the resultant loss of U. S. Tax revenues can be substantial.
>
> "Of course, extensive Regulations setting forth procedures for determining arm's-length transfer prices were published in 1968, and have limited the range of discretion previously available to taxpayers. But no one familiar with international tax planning believes that these Regulations have taken the tax incentive out of transfer-pricing. The 1968 Regulations reduced, but by no means eliminated, the flexibility which companies have in setting inter-affiliate prices."

Even the courts have commented on the administrative and expense problems involved.

> "As evidenced by the magnitude of the record compiled in this case, the resolution by trial of a reallocation controversy under section 482 can be a very burdensome, time-consuming and obviously expensive process—especially if the stakes are high. A more manageable and expeditious means of resolution should be found." *E. I. DuPont DeNemours and Co. v. US,* 608 F2d 445 (Ct Cl, 1979).

POINT II

The provisions of the Internal Revenue Code and various United States treaties do not restrict and cannot be deemed to restrict the states' taxing power under the Foreign Commerce Clause.

Article I, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "to regulate commerce with foreign Nations and among the several States, * * *". This Court has interpreted the Commerce Clause as only prohibiting state taxes which interfere with or discriminate against interstate or foreign commerce. Although a burden on commerce, as are all taxes, state taxes imposed on the unapportioned gross receipts from business activities in the taxing State, or net income apportioned to reflect fairly business activities in the taxing State, have been held constitutional.

In arguing that California's tax on Container violates the Foreign Commerce Clause, Container relies upon this Court's decision in *Japan Line, Ltd. v. County of Los Angeles,* 441 US 434 (1979). However, *Japan Line* dealt with an *ad valorem* property tax on instrumentalities of foreign commerce; whereas, this case is concerned with a franchise tax measured by the income of a group of multinational corporations linked together as a unitary business. In distinguishing the *Japan Line* case, this Court in *Mobil* pointed out a basic fact which makes the *Japan Line* case inapplicable to the *Container* case as well:

> "Appellant's attempted analogy between this case and Japan Line strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the

> allocation method in property taxation have no immediate applicability to an income tax." *Mobil Oil Corporation v. Commissioner of Taxes,* 445 US 425, 447 (1980).

The analysis of any question involving state taxation and an alleged Commerce Clause violation must begin, of course, with the criteria set forth in *Complete Auto Transit, Inc. v. Brady,* 430 US 274 (1977). It was held in *Complete Auto* that a state tax constitutes an impermissible burden on interstate commerce if it is found

> "that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Id.,* at 287.

Container asserts that, because worldwide apportionment conflicts with the separate accounting system set forth in the Internal Revenue Code and in various United States treaties, such an apportionment method impairs the ability of the United States to implement a uniform foreign policy, hence violating the Foreign Commerce Clause. In essence, Container advances the proposition that the provisions of the Code and various treaties imply a restriction on the states' taxing power; specifically, that the States are prevented from using worldwide apportionment and are required to use separate accounting when measuring the income of taxpayers who have foreign source revenue. However, this Court has steadfastly refused to allow such restrictions to be imposed upon the States by implicit operation of the Foreign Commerce Clause. This has been the case whether such implications are argued to have arisen by virtue of the Internal Revenue

Code or treaties,* or both. Moreover, the absence of any explicit Federal mandate and, indeed, Congress' express rejection of such restrictions clearly reveals an intention not to so restrict the States.

To begin with, this Court ruled in *Mobil Oil Corp.* that a restriction on the states' power to include foreign-source dividends in a taxpayer's tax base cannot be inferred from Federal "statutes and treaties":

> "Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." *Mobil Oil Corp., supra* at 448.

This ruling in *Mobil Oil Corp.* reiterates the long-standing position taken by this Court that the provisions of treaties will not be expanded by implication to restrict an entirely proper and constitutional exercise of power by the States:

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them." *Guaranty Trust Co. of New York v. United States,* 304 US 126, 143 (1938). (See cases cited in support of the above quote, which go back to 1832.)

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*We note that the constitutionality of regulating the States' power to tax by treaty-making, thereby bypassing the House of Representatives and various Congressional committees in the establishment of Federal tax policies, has been questioned. See, e.g., 124 Cong Rec 5132 and 6520 (remarks of Senator Gravel and Senator Stevens, respectively). However, this question need not even be reached in this case since, as will be shown below, the Senate has rejected efforts to so regulate the States. Indeed, we also note that neither Container, nor the Solicitor General in its *amicus* brief in the *Chicago Bridge & Iron* case, base this aspect of their argument on the treaty-making clause. Thus, the statements in this brief should not be taken as an expression in support of the constitutionality of restricting the States' taxing power solely by treaty.

Container's contention in this regard not only runs afoul of the Court's refusal to infer such restrictions, but also it is a position which is belied by the facts. Examples of Congress' flat rejection of such express restrictions abound, both in the context of legislation and treaties. With respect to legislation, the Federal government has not chosen to prevent the States from using formulas which apply to State aspects of interstate and international activities or operations. See this Court's discussion in *Mobil Oil Corp., supra,* 445 US at 448-49. Since that time, Congress has again considered the problem of combined reporting and its effects on interstate and foreign commerce. Proposed legislation which was designed to preempt the States from taking foreign value into account and thereby overturning *Mobil* was considered by the House Committee on Ways and Means, but the proposal was permitted to die without any action. See H R 5076, 96th Cong, 2d Sess; Hearing before House Committee on Ways and Means on State Taxation of Foreign Source Income, March 31, 1980, Serial 96-81, e.g. at pp 1-2.

With respect to treaties, a rather dramatic example of Congress' intention not to so restrict the States is found in the history leading up to the ratification of the United States/United Kingdom Income Tax Treaty (hereinafter referred to as the "U.K. Treaty".) (See *P-H Federal Taxes, Tax Treaties II,* ¶ 89,030, *et seq.*, at 89,031, *et seq.* for the official title and full text of the U.K. Treaty). When the U. K. Treaty was submitted to the Senate for advice and consent to ratification, it contained, in paragraph 4 of Article 9, a provision which explicitly prohibited the States from using worldwide apportionment for taxation of U. K. enterprises and subsidiaries. *P-H Federal Taxes, Tax Treaties II,* ¶ 89,001, at 89,003 and ¶ 89,003, at 89,007. (See *P-H Federal Taxes, Tax Treaties II,* ¶ 89,039, at 89,038 for the text of Article 9[4]). At the time, it was

recognized, even by the U. K. Treaty's proponents,* that an express restriction of the States' taxing power was something which had not been attempted previously:

> "The proposed treaty contains a new provision, *not found in other United States tax treaties,* which places limitations on the combined reporting method used by several states of the United States to determine the taxable income which multinational corporations derive from sources within the State." Report of the Senate Committee on Foreign Relations, Exc Rept No 95-18, 95th Cong, 2d Sess, found in *P-H Federal Taxes, Tax Treaties II,* ¶ 89,070, at 89,100-1 (emphasis added).

However, when the U. K. Treaty reached the floor of the Senate, paragraph 4 of Article 9 was eliminated by reservation. Accordingly, the Treaty was ultimately ratified by the Senate in 1979 without the inclusion of the restriction. *P-H Federal Taxes, Tax Treaties II,* ¶ 89,001 at 89,003 and ¶ 89,003, at 89,007.

Despite clear evidence that Congress has not intended to restrict the states' use of worldwide apportionment, Container argues that such restrictions should be implied from the Internal Revenue Code and various treaties. This Court's refusal to impose such restrictions by implication is a clear admonition to parties such as Container that this Court will not act where Congress has refused to act. Thus, Container's contention that worldwide apportionment violates the Foreign Commerce Clause is without merit.

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*The Senate Foreign Relations Committee recommended to the entire Senate that the U. K. Treaty, including Article 9(4), be ratified. See Report of the Senate Committee on Foreign Relations, Exc Rpt No 95-18, 95th Cong, 2d Sess, found in *P-H Federal Taxes, Tax Treaties II,* ¶ 89,070, at 89,100-L through 89,100-M.

CONCLUSION

Since California has not exercised its taxing power in an extraterritorial manner and has not violated the Foreign Commerce Clause, the decision of the California Court of Appeal should be affirmed.

Dated: Albany, New York
September 28, 1982

Respectfully submitted,

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